No. ~~88-2084~~ 87
No. 88-214

In The

Supreme Court of the United States

October Term, 1988

NORMAN JETT,

Petitioner,

vs.

DALLAS INDEPENDENT SCHOOL DISTRICT,

Respondent.

DALLAS INDEPENDENT SCHOOL DISTRICT,

Cross-Petitioner,

vs.

NORMAN JETT,

Cross-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I. Petitioner can sue directly under 42 U.S.C. § 1981.

The Fifth Circuit construed Section 1981 to include a "policy or custom" requirement.[1] We sought certiorari on that point,[2] and most of our brief addressed that issue.[3] After we had briefed, Respondent chose to raise what it calls "another — and more serious — issue".[4] Respondent now says that local governments are simply not subject to civil suit under Section 1981. According to Respondent, a claim against a local government for deprivation of rights secured by Section 1981 can only be brought under Section 1983. And, of course, Section 1983 contains a "policy or custom" requirement.

There are three problems with this argument. First, it comes too late (Part A below). Second, this Court has previously rejected it (Parts B and C). Third, it fails on its merits (Parts C and D).

A. The court should not consider Respondent's new argument.

Respondent's claim that there is no civil cause of action under Section 1981 is an afterthought, "and like most afterthoughts in litigated matters it is without adequate support in the record."[5] The record contains no hint that Respondent has ever challenged our right to sue directly under Section 1981. Indeed, Respondent has conceded our right to sue under Section 1981 at all times.

In the District Court, The Respondent failed to contest our right to sue in its Rule 12(b)6 motion to dismiss, its motion for

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1 Pet. App. pp. 27A-30A.

2 Pet. pp. 9-29

3 Pet.Br. pp. 11-31.

4 Resp.Br. p. 14.

5 *Hague v. C.I.O.*, 307 U.S. 496, 522 (1939) (Stone, J., concurring).

summary judgment, its portion of the proposed pretrial order, its requested jury issues and instructions, its objections to the jurycharge, Tr. 649-683, its motions for directed verdict, Tr. 597-612, 643-644, its motion for judgment n.o.v., and its motion for new trial.

To the contrary, in its motion for directed verdict, Respondent spoke of racial discrimination "for which Section 1981 was adopted primarily and intended to redress." Tr. 599. In its Rule 12(b)(6) motion, pp. 3-5, Respondent discussed the plaintiff's burden of proof under Section 1981 and concluded by suggesting that Petitioner be required to replead "his 42 U.S.C.A. § 1981 claim."

Before the Fifth Circuit, where Respondent was Appellant, Respondent only argued that the rule of *respondeat superior* should not apply to Section 1981.[6] There is no suggestion that we could not sue under Section 1981, and Respondent's brief expressly referred to "Section 1981 actions" on no less than eight occasions.[7]

The Fifth Circuit accepted Respondent's argument. It rejected the application of *respondeat superior* and held that Section 1981 suits must meet a "policy or custom" standard. At the same time, it accepted our right to bring suit directly under Section 1981.

The Respondent did not seek review of the Fifth Circuit's decision that we could sue directly under Section 1981. Nor did it suggest, either in its Response to our Petition or in its Cross-Petition, that it had doubts as to whether such a suit could be brought. Instead, it "acknowledg[ed] the need for further definition of the 'contours' of municipal liability under 42 U.S.C. § 1981." Reply to Pet., p.7, and said that the "Fifth Circuit correctly held that the requirements of *Monell*...would be extended to claims for damages against municipalities based upon employment decisions alleged to be in violation of 42 U.S.C.A. §1981."

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6 No. 85-1015, Brief of Appellants, pp. 2-3, 37-41, 60-68, and Brief of Appellants in Response to Apellee's Brief, pp. 6-7.

7 No. 85-1015, Brief of Appellants, pp. ii, 60, 61, 63, 64, 65, 66.

Cross Pet. p. 6. It was only after this Court granted certiorari — and after we briefed — that Respondent first questioned the longstanding precedent allowing civil suits directly under Section 1981.

The Court should decline to consider Respondent's argument. Instead it should decide the issue "squarely presented to and decided by the Court of Appeals"[8] and upon which this Court granted certiorari.[9] "It is most unfair to permit a defeated litigant in a civil case tried to a verdict before a jury to advance legal arguments that were not made in the district Court, especially when that litigant *agrees*, both in its motions and its proposed instructions, with its opponent's view of the law."[10]

B. Respondent's argument is contrary to longstanding precedent.

Respondent says Congress viewed the Civil Rights Act of 1866 "as limited to a criminal remedy." Resp. Br., p. 26. For 120 years, however, the federal courts have allowed civil suits to enforce that statute and its modern descendents, Section 1981 and 1982.

1. Nineteenth Century precedent.

Immediately after enactment of the 1866 Civil Rights Act, three members of this Court, sitting as Circuit Justices, wrote that the statute could be enforced by way of civil action in the federal courts.

In *In re Turner*, 24 Fed. Cas. 337 (C.C.D.Md. 1867), a black apprentice sought release from her indenture because its terms did not provide for the education which Maryland law guaranteed to white apprentices. Chief Justice Chase granted her petition for

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8 *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

9 *See City of Canton v. Harris*, No. 86-1088, (February 28, 1989), at n. 5; *Miree v. DeKalb County*, 433 U.S. 25 (1977); and *Adickes v. Kress*, 398 U.S. 144, 147 n. 2 (1970).

10 *City of St. Louis v. Praporotnik*, 485 U.S. ____, 108 S.Ct. 915, 945-6 (1988) (Stevens, J., dissenting) (emphasis in opinion).

habeas corpus, holding that the indenture was "in contravention of that clause of the first section of the civil rights law...which assures to all citizens without regard to race or color, 'full and equal benefit of all laws and proceedings for the security of persons as is enjoyed by white citizens...' " 24 Fed. Cas., at 339.[11] Three years later Justice Bradley permitted private parties to obtain injunctive and declaratory relief directly under the 1866 Act. *See Live Stock-Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Land & Slaughter-House Co.*, 15 Fed. Cas. 649, 655 (C.C.D. La. 1870). Finally, in *United States v. Rhodes*, 27 Fed. Cas. 785, 786 (C.C.D.Ky. 1866), Justice Swayne construed the grant of jurisdiction in Section 3 of the 1866 Act to include "causes of civil action."[12]

2. Modern precedent.

In *Hurd v. Hodge*, 334 U.S. 24 (1948), the Court used Section 1982 to strike down racially restrictive covenants in the District of Columbia. While Section 1982 was raised as a defense in *Hurd*, that was not the case less than a month later in *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948). There the court invalidated a California law denying fishing licenses to certain aliens and allowed the plaintiff to obtain mandamus in state court to enforce rights guaranteed by Section 1981. 334 U.S., at 419-420.

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court held that Section 1982 reaches acts of private racial discrimination in housing, and it allowed plaintiffs to obtain an injunction. 392 U.S., at 414 n. 14. Although *Jones* left open the issue of damages, *Id.*, that question was soon resolved. In *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), the court expressly allowed a plaintiff to recover damages under Section 1982, and in *Tillman v. Wheaton-Haven Recreation Ass'n* 410 U.S. 431 (1973), the Court allowed damages under both Sections 1982 and 1981.

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11 *See also, In re Hobbs*, 12 Fed. Cas. 262 (C.C.D. Ga. 1971), denying habeas corpus because the state statute involved did not "conflict with the c' 'il rights bill."

12 In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 457 n. 3, Justice Harlan read Section 3 to give federal courts concurrent jurisdiction over "all cases in which the specified rights were denied."

Finally, in 1976 the Court wrote that "[a]n individual who establishes a cause of action under Section 1981 is entitled to both equitable and legal relief, including [damages and backpay]." *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-460 (1976).

Since *Johnson* the Court has considered claims under Sections 1981 and 1982 on six occasions. In four of these cases it upheld rights of individual plaintiffs to recover.[13] In the other two cases the Court denied recovery while recognizing that civil suits can be brought directly under Section 1981 and Section 1982.[14] Finally, the right of individuals to bring suit suit and recover damages under Section 1981 has been affirmed by all of the circuits.[15]

Against this weight of authority the Respondent can cite not a single case. Obviously, the enforcement of Section 1981 is not limited to the criminal penalties originally found in section 2 of the 1866 Act. Private individuals *do* have a right to sue directly under Sections 1981 and 1982.

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13 *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285 (1976); *Runyon v. McCrary*, 427 U.S. 160, 168 (1976); *Shaare Tefila Congregation v. Cobb*, ___ U.S. ___, 107 S.Ct. 2019, 95 L.Ed.2d 594, 598 (1987); and *St. Francis College v. Al-Khazraji*, ___ U.S. ___, 107 S.Ct. 2022, 2026 (1987).

14 In *General Bldg. Contractors v. Pennsylvania*, 458 U.S. 375, (1982), Justice O'Conner summarized the majority opinion as holding that "a *cause of action* based on 42 U.S.C. § 1981 requires proof of intent to discriminate." 458 U.S., at 403 (emphasis added). In *City of Memphis v. Green*, 451 U.S. 100 (1981), the Court characterized *Sullivan* as holding that a plaintiff "had a *cause of action* under *§ 1982*" *(emphasis added). 451 U.S., at 121 n. 33. (emphasis added)*

15 *See, e.g., Metrocare v. Washington Metropolitan Area Transit Auth.*, 679 F.2d 922, 927 (D.C. Cir. 1982); *Springer v. Seaman*, 821 F.2d 871 (1st Cir. 1987); *Mahone v. Waddle*, 564 F.2d 1018 (3rd Cir. 1977), *cert. den.*, 483 U.S. 904 (1978); *Jett v. Dallas I.S.D.*, 798 F.2d 748 (5th Cir. 1986), *on motion for rehearing*, 837 F.2d 1244 (5th Cir. 1988); *Leonard v. City of Frankfort*, 752 F.2d 189 (6th Cir. 1985); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); Taylor v. Jones, 653 F.2d 1193, 1200 (8th Cir. 1981); *Greenwood v. Ross*, 778 F.2d 448, 456 (8th Cir. 1985); *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157 (9th Cir. 1976) (en banc); *EEOC v. Gaddis*, 733 F.2d 1373, 1380 (10th Cir. 1984).

C. Civil suits against governmental entities cannot be distinguished.

1. Respondent's position cannot be squared with existing case law.

Respondent attempts to distinguish our case because the defendant is a local government. Respondent implies that this court has limited its Section 1981 holdings to private parties. Resp. Br. p. 17. Yet Section 1981 plaintiffs were allowed to recover against the State of California in *Takahashi, supra*, 334 U.S. 410.[16]

Respondent also concedes that certain kinds of civil suits *can* be brought against local governments under Section 1981. It agrees that Congress intended to allow civil suits under the 1866 Act to obtain habeas corpus relief, Resp. Br. p. 29, and to enforce the rights "to sue, be parties, and give evidence...and to the full and equal benefit of all laws." Resp.Br. pp. 26-27 n. 31. Additionally, Respondent conceded before the Fifth Circuit that federal courts "have equitable power to order remedial relief, where the discrimination occurs by employees, such as back pay, reinstatement, and injunctive relief."[17] These concessions render the Respondent's position untenable.

First, our claims are not limited to damages. Petitioner

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16 All of the Circuit Court cases in the preceding footnote involved suits against local governmental entities, except for *Gaddis*. Respondent dismisses these as the result of "offhanded *sub silentio* assumptions". Resp. Br. p. 18. Yet, that is hardly a fair description of *Sethy*, where the en banc Ninth Circuit allowed Section 1981 recovery against a municipal water district, or *Bhandari v. First Nat'l Bank of Commerce*, 829 F.2d 1343 (5th Cir.) (en banc, where the Fifth Circuit decided that a Section 1981 claim for alienage discrimination can be brought *only* against the state. Nor does this do justice to the Third Circuit's monumental effort in *Mahone*, whose dissent provides most of Respondent's arguments.

17 Brief of Appellants, No. 85-1015, p. 7.

also sought backpay and attorney's fees. Jt.App. p. 7.[18]

Second, it's difficult to extract a coherent rule of law from Respondent's position. Respondent would allow a private party to be sued for damages, but a local government could only be sued for equitable and declaratory relief — plus habeas corpus — plus claims arising from a deprivation of the right "to sue, be parties and give evidence" — plus claims arising under the "full and equal benefit" clause.

Third, Respondent's position will subject private defendants to a *more* rigorous liability standard than governments. A local government whose agent racially discriminates in leasing public housing will be insulated by the "policy or custom" standard. A private landlord whose leasing agent practices racial discrimination will be liable under a less demanding standard. Surely the 1866 Congress could not have intended such an anomaly.

2. The Court has already rejected Respondent's argument.

Respondent says that "§ 1983 is the means by which one obtains a cause of action against a municipality to protect the rights and privileges protected in § 1981. Likewise § 1981 does not, by its own language, grant any cause of action; it only details substantive rights." Resp. Br. p. 15. The argument is not new. In *Jones v. Alfred H. Mayer,* the Respondent argued as follows:

> ...nowhere in this entire first section of the original [1866 Civil rights Act] is there any mention of any *remedy* or *right to sue* for any kind of relief . . . .[I]t does no more than make a general statement of constitutional policy . . . The only

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18 Petitioner was paid through the date he "resigned" rather than report to his new assisgnment as ninth grade coach. Pet.Br. p. 6. The jury found that Petitioner was constructively terminated, but this finding was set aside by the Fifth Circuit which concluded "as a matter of law" that Petitioner's ordeal was simply "not so difficult or unpleasant." Pet. App. p. 7. Respondent contends that this finding has not been challenged, but this is incorrect. Although we did not seek certiorari on that question, we did preserve it. Pet. App. p. i, Question 4.

purpose now served by [it] is an incomplete compendium of rights the violation of which may give rise to civil suit under . . . Section 1983 of 42 U.S.C. . . .

[T]he section of the Act out of which present Section 1982 was carved was simply a "general statement of constitutional policy" and by itself afforded no civil . . . remedy. . . . [A]t the time of its enactment the Act contained no civil remedy at all . . . . [A] civil remedy was added in 1871.[19]

The Court rejected this argument in *Jones*, 392 U.S., at 414 nn. 13-14 (citing cases). It is now settled that the 1871 Act "created a new civil remedy, neither repetitive of nor entirely analogous to any of the provisions of the earlier Civil Rights Acts." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 651 (1979) (White, J. concurring).

3. Congress did not intend for Section 1981 rights to be enforced by Section 1983 suits.

a. Congress intended to provide for different civil remedies under Sections 1981 and 1983.

Respondent argues that the civil cause of action under Sections 1981 and 1982 is purely judge-made: it was necessary for the *Johnson* Court to "create" such a remedy, since there was no existing remedy for racial discrimination by private employers. Therefore, we are told, there is no need for the Court also to "create" a civil cause of action against government employers under Section 1981, since Section 1983 is already available to remedy employment discrimination by those defendants. Resp.Br. pp. 16-17.

Respondent's argument is premised on the notion that, when *Johnson* was decided in 1976, there was no statute to remedy racial discrimination by private employers. But this is simply

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19 No. 645, Oct. term, 1967, Brief for Respondents, pp. 40-41 (emphasis omitted).

wrong. Twelve years earlier, Congress enacted Title VII to the Civil Rights Act of 1964. Title VII provides a comprehensive set of remedies against both public and private employers. In fact, in *Johnson* the plaintiff brought suit under Section 1981 *and* Title VII. The *Johnson* Court rejected the argument that since the employee could sue under Title VII, he could not sue under Section 1981. Congress intended for an employee to have both remedies. 421 U.S., at 457. Similarly, Congress intended for the remedies under Sections 1981 and 1983 to be independent of one another. *Cf., Burnett v. Grattan*, 468 U.S. 42 (1984) ("...the independence of the remedial scheme established by the reconstruction Era Acts.")

b. Congress preserved the civil cause of action under the 1866 Act by including a saving clause in the 1871 Act.

Respondent says that, even if Congress intended to allow civil actions under Section 1981, it somehow changed all this by enacting Section 1983. The argument is familiar. The Fifth Circuit reasoned that, by enacting the 1871 statute, Congress somehow engrafted a "policy or custom" requirement onto the existing Section 1981 cause of action. In our opening brief, we showed that this argument ran afoul of the knotty problems of "repeal by implication." Pet. Br. pp. 15-18. *See also*, Comment: *Jett v. Dallas Independent School District:* The Applicability of Municipal Vicarious Liability Under 42 U.S.C. Section 1981. Notre Dame Law Rev. Vol. 63, No. 2, pp. 240-242 (1988).

Now the Respondent argues that when Congress enacted the 1871 Act, it repealed the existing civil remedy under the 1866 Act. This left the 1871 statute, the modern Section 1983, as the exclusive civil remedy for Section 1981 violations, according to Respondent. Of course, this also would be a repeal by implication, and the arguments which we made in our opening brief apply here with equal force.

Yet, there is no need to trudge through those arguments again. The saving clause in Section 7 of the 1871 Act reads as follows:

> That nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto.

Jt.App. p. 106. Thus, Congress intended that the 1871 Act (Section 1983) would have *no effect* on the 1866 Act (Section 1981).

D. Congress intended that the 1866 Civil Rights Act would be enforced by civil suit.

Although the 1866 Act contained no provision expressly granting a right to sue, there is ample evidence that Congress "actually had in mind the creation of a private cause of action." *Thompson v. Thompson*, 108 S.Ct. 513, 516 (1988). We examine, as always, the "language and history"[20] of the statute.

1. Statutory language.

Section 3 of the 1866 Civil Rights Act is set forth below. The various clauses are numbered for reference.

[FIRST CLAUSE]

> The district court...shall have, exclusively of the courts of the several states, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts..., of all *causes, civil* and criminal, *affecting persons* who are denied or cannot *enforce* in [state courts] any of *the rights secured to them by the first section of this act;*

[SECOND CLAUSE]

> and if any suit or prosecution, civil or criminal [is] commenced in any State court against any officer, civil or military, or other person [for certain specified acts], such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the [1863 Habeas Corpus Act].

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20 *City of St. Louis v. Praprotnik*, 108 S.Ct. 915, at 923 (plurality).

[THIRD CLAUSE]

> The jurisdiction in *civil* and criminal *matters* hereby conferred on the district and circuit courts ...shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry same into effect;

[FOURTH CLAUSE]

> but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable *remedies* and punish offences against the law, *the common law shall be extended and govern* said courts in the trial and disposition of *such cause* and, if of a criminal nature, in the infliction of punishment on the party found guilty.

Jt. App. p. 85 (emphasis added).

In *Moor v. County of Alameda*, 411 U.S. 693 (1973), the court reviewed the history of this statute and concluded that "[t]he initial portion of § 3 of the Act established federal jurisdiciton to hear, among other things, *civil actions brought to enforce § 1*". 411 U.S. at 705 (emphasis added). The italicized language in the First Clause is consistent with this view. Individual "persons" could bring suits ("civil causes") to enforce "any of the rights secured by" section 1 of the Act.[21] There is no other way to explain this language.

It has been argued, for example, that Section 3 merely "permitted defendants who could not enforce their rights in state court to remove the proceedings against them to federal court."[22] But, only a defendant can remove a case. The First Clause, however, does not speak of defendants. It uses a broader term, i.e., "persons". Removal is dealt within the Second Clause, which does say "defendants". Clearly the "persons" referred to in the First Clause included plaintiffs.

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21 *See also, Cannon v. University of Chicago*, 441 U.S. 677, 736 n. 7 (1979) (Powell, J., dissenting).

22 *Mahone v. Waddle*, 564 F.2d 1018, 1045 (3rd Cir. 1977), (Garth, J., dissenting).

Respondent argues for another interpretation: this language merely "was meant to allow a person to bring a state law claim into the federal courts when some state law requirement precluded it from being litigated in the local system." Resp.Br. p. 26 n. 31. Specifically, we are told, Congress had in mind state statutes which prohibited blacks from testifying against whites. *Id.* While this view was advanced at one time[23], it was ultimately rejected by the Court.[24]

Additionally, such an approach would involve only part of the rights secured by Section 1, i.e., the right "to sue, be parties, and give evidence." Congress, however, again spoke in broader terms. The First Clause allows "civil causes" to "enforce" "*any of the rights*" secured by Section 1.

This Court has consistently construed this kind of broad, jurisdictional language as evidencing Congressional intent to permit civil suits. Thus in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), the Court construed a grant of jurisdiction "over all suits in equity and actions at law brought to enforce any liability or duty created" by a particular statute. The Court held that this conferred a right to sue. 311 U.S., at 288.[25]

Similarly, the Court has also found evidence of Congressional intent to create a civil cause of action in broad declarations of rights, such as found in Section 1 itself.[26]

Moreover, in evaluating Congressional intent, the Court "must take into account [the] contemporary legal context."[27] The 1866 Congress had every reason to expect

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23 *Cf., United States v. Rhodes*, 27 Fed.Cas. 785, 787-788 (C.C.D.Ky. 1866), *with Texas v. Gaines*, 23 Fed.Cas. 869, 870-871 (C.C.W.D.Tex. 1874).

24 *See Bylew v. United States*, 80 U.S. 638, 641 (1872). *See also, Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 631 n. 11 (1979).

25 *See also, J.I.Case Co. v. Borak*, 377 U.S. 426, 428 n.2 (1964); *Allen v. State Board of Elections*, 393 U.S. 544, 561 (1969); *Sullivan*, 396 U.S., at 238.

26 In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court noted that "this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case." 441 U.S., at 690 n. 13. The *Cannon* Court cited the language of Sections 1981 and 1982 as its primary example.

27 *Cannon*, 441 U.S., at 698-699.

that the courts would permit suits under the Civil Rights Act, even absent specific language creating a civil remedy. The 39th Congress was concerned with civil rights, and in *Marbury v. Madison*, Chief Justice Marshall had written that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury".[28] The practice of allowing civil suits in the absence of specific statutory authorization was well established by the Civil War[29] and can be traced to English common law authorities.[30] During this period "federal courts, following a common law tradition regarded the denial of a remedy as an exception rather than the rule."[33] Thus it is hardly surprising that Congress omitted statutory language expressly creating a right to sue under the Civil Rights Act.

2. Legislative Debates

a. The 1866 Debates

On the day he introduced the Civil Rights bill, Senator Trumbull declared:

> Th[e thirteenth] amendment declared that all person in the United States should be free...There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons are to be affected by them have some *means of availing themselves of their benefits.*[34]

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28 5 U.S., at 163.

29 *See Union Iron Co. v. Pierce*, 24 Fed.Cas. 583 (C.C.D.Ind. 1969), and cases cited at Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 36 (1916), and *Bell v. Hood*, 327 U.S. 678, 684 nn. 6 & 7 (1946); *see also, National Sea Clammers*, 453 U.S. at 23 n. 2 (Stevens, J., concurring); *Curran*, 46 U.S., at 374-375 & nn. 53 & 54.

30 *See Rigsby*, 241 U.S., at 36, *Cannon*, 141 U.S., at 689 n. 10; *Transamerica v. Lewis*, 444 U.S., at 26 n. 2 (White, J., dissenting); *Curran*, 102 S.Ct. at 374 n. 52.

31 & 32. Footnotes 31 & 32 deleted.

33 *Curran*, 456 U.S. at 375-376.

34 Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (emphasis added).

Trumbull described Section 3 as creating federal jurisdiction "over the cases of persons who are discriminated against by State laws or customs".[35] In the subsequent debate, before the Senate voted to override President Johnson's veto, Trumbull defended the provision of Section 3 in which "jurisdiction is given to the Federal courts of a case affecting the person that is discriminated against."[36]

Where, for example, a discriminatory state law or custom was being enforced against an individual:

> then he could go into the Federal court. . . .If it be necessary in order to protect the freedmen in his rights that he should have the authority to go into the Federal courts in all cases where a custom prevails in state, or where there is a statute-law of the state discriminating against him, I think we have the authority to confer that jurisdiction under the second clause of the [Thirteenth] amendment. . . . That clause authorizes us to do whatever is necessary to protect the freedman in his liberty. The faith of the nation is bound to do that; and if it cannot be done without, [we] would have authority to allow him *to come to the federal courts* in all cases.[37]

Opponents of the bill understood that it authorized a civil cause of action.

> [T]his bill sends the people with their causes *into the courts* of the United States. . . . I am not so much afraid of any law that sends the people *to the courts* as I am of a law which places them under the control and power of irresponsible officials. . . . Sir, what is this bill? It provides, in the first place, that the civil rights of all men, without regard to color shall be equal; and, in the second place, that if any man shall violate that principle by this conduct, he shall be responsible to the court; that he may be prosecuted criminally and punished for the crime, *in a civil action and damages recovered by the party wrongful.* Is that not broad

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35 *Id.* at 475.

36 *Id.* at 1759.

37 *Id.* at 1759 (emphasis added).

enough?[38]

Senator Cowan criticized the provision for a civil remedy "as a delusion and a snare"[39] because the federal courts were located so far from most claimants, and the cost of litigation there was so high.

Respondent argues that Congress "rejected the right to a damage action" when it disapproved a motion by Representative Bingham to recommit the bill. Resp. Br. p. 25. Respondent describes Bingham as "one of the foremost supporters of civil rights", Resp. Br. p. 24, but Bingham was in fact one of the leading *opponents* of the 1866 Civil Rights Bill, and he ultimately voted against it.

It's inaccurate to describe Bingham's proposal as providing for a civil action. Bingham moved to recommit the bill with two instructions. First, he advocated deleting the general language prohibiting *all* forms of racial discrimination. See Resp. Br. p. 24; Cong. Globe, 39th Cong., 1st Sess. 1271-72, 1291. Second, Bingham proposed

> *to strike out all parts of said bill which are penal*, and which authorized criminal proceedings, and *in lieu thereof* to give to all citizens injured by denial or violation of any of the other rights secured or protected by said act an action in the United States courts with double costs in all cases of recovery, without regard to the amount of damages.

Id. (emphasis added). Respondent suggests that this was a proposal to *add* to the remedies in the 1866 Act, and that in considering the Bingham motion Congress "grappled with the availability of a right of action to enforce section 1 and explicitly rejected it." Resp. Br. p. 25 (emphasis added).

But neither Bingham, nor any member of the House who addressed his motion, regarded it as a proposal to *add* anything to the enforcement of the Act. It was regarded as a proposal to *remove* the criminal remedy. Bingham's speech in support of his

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38 *Id.* at 601 (emphasis added).

39 *Id.* at 1782-1783.

40 Footnote 40 deleted.

motion was a lengthy diatribe against the 1866 Act, particularly the anti-discrimination provision.[41] With regard to the second part of his motion, quoted above, Bingham's only explanation was as follows:

> You propose to make it a penal offense for the judges of the States to obey the constitution and laws of their states, and for their obedience thereto to punish them by fine and imprisonment as felons. You cannot make an official act, done under color of law, and without criminal intent and from a sense of public duty, a crime.[42]

Bingham insisted that the effect of his proposal was "to take from the bill what seems to me its oppressive and I might say its unjust provisions."[43]

Although the supports of the 1866 Act generally opposed Bingham's proposal, none of them expressed any opposition to the existence of civil remedy or suggested that such a remedy was any less appropriate than the disputed penal provision. On the contrary, Representative Shellabarger argued:

> What difference in principle is there between saying that the citizen shall be protected by the legislatie power of the United States in his rights by civil remedy and declaring that he shall be protected by penal enactments against those who interfere with is rights? There is no difference in the principle involved.[44]

Nothing in the debates on Bingham's motion suggests that Congress thought it was 'grappl[ing] with the availability of a right of action to enforce section 1". What Bingham intended to bring about, and all that Congress "grappled with", was the *deletion* of the criminal sanctions for the enforcement of Section 1. No representative who spoke in favor of or against Bingham's motion treated it as *adding* anything to the civil rights bill.

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41 *Id.* at 1291-93.

42 *Id.* at 1293; see also *id.* at App. 157 (Rep. Delano).

43 *Id.* at 1291.

44 *Id.* at 1295.

b. Subsequent Debates

Respondent also relies on statements made during the debates of subsequent sessions of Congress, but its summaries are inaccurate. Respondent asserts that in 1870 "[t]he remarks of Senator Pool, . . . present the view that the Civil Rights Act was *solely* to be enforced as a criminal statute." Resp. Br. p. 27 (emphasis added). The word "solely" does not appear in Senator Pool's remarks. Cong. Globe, 41st Cong., 2d Sess. 3611 (1870). Respondent characterizes Representative Shellabarger as saying that "whereas *the 1866 Act* was *only* criminal". Resp.Br. p. 28 (emphasis added). Shellabarger did not say that the 1866 Act was "only" criminal. Cong. Globe, 42nd Cong., 1st Sess. App. 68 (1871). It is true that Representative Blair criticized the Sherman Amendment for imposing a novel "obligation" on cities, but the obligation to which he objected was the affirmative duty to stop all riots within the city's jurisdiction. *Id.* at 795, quoted in *Monell*, 436 U.S. at 673. Blair could not have meant, as Respondent suggests, that municipal liability based on *respondent superior* was "without a precedent in this County", because by 1866 the application of *respondent superior* to claims against muncipalities had been accepted by courts in virtually every state.[45]

E. Subsequent sessions of Congress have approved the Section 1981 civil remedy

a. Section 1983

Section 1 of the Ku Klux Klan Act of 1871 provided that defendants would be "liable" in an "action at law... to be prosecuted in the [federal courts], with and subject to the same rights of appeal, review upon error, and other remedies provided in *like cases* in such courts *under the provisions of the [Civil Rights Act of 1866].*" Jt.App. p. 101-102 (emphasis added). If a right to sue under the 1866 statute did not exist, then why the reference to "like cases"?

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45 Brief Amicus Curiae of the NAACP Legal Defense and Educational Fund, Inc., *et al.*, at pp. 22-47.

b. Refusal to amend Section 1981

As shown, the courts have upheld the right to enforce Section 1981 by civil suit almost from the beginning. This fact, coupled with Congress' refusal to amend the statute, is itself evidence that Congress approved the availability of a civil action under Section 1981.[46] Thus, when Congress enacted Title VII, it noted "that the remedies available to an individual under Title VII are co-extensive with the ind[i]vidual's right to sue under... § 1981." *Johnson*, 421 U.S., at 459. "Later in considering the Equal Employment Opportunity Act of 1972, the Senate rejected an amendment that would have deprived a claimant of any right to sue under § 1981." *Id.*

c. The amendment to Section 1988

In *Moor v. County of Alameda*, 411 U.S. 693 (1973), the Court traced 42 U.S.C. § 1988 to the Fourth Clause of Section 3 of the 1866 Act. 411 U.S. *Id.*, at 705. It was "plain on the face of the statute" that section 1988 was "intended to complement the various acts which do create federal causes of action for the violation of federal civil rights," 411 U.S., at 702, including "42 U.S.C. §§ 1981, 1982, 1983, 1985," 411 U.S., at 702, n. 13, and that "Congress...directed that § 1988 would guide the courts in the enforcement of a particular cause of action, namely that created in § 1981." *Id.*, at 705 n. 19.

In 1976, however, the Court refused to construe Section 1988 to allow the award of attorneys fees in an action brought directly under Section 1981.[47] Four months later Congress passed the Civil Rights Attorneys' Fees Awards Act, which amended Section 1988 to allow recovery of attorneys fees "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986..." 42 U.S.C. § 1988.

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46 *Cannon*, 441 U.S., at 703 & nn. 7 & 40; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 732-733 (1975); *Merrill Lynch, Pierce Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, at 381-382 (1982); *Herman & MacLean v. Huddleston, 459 U.S. 375 (1983)*, *Monessen Southwestern Ry. Co. v. Morgan*, 108 S.Ct. 1837, 1844 (1988).

47 *Runyon*, 427 U.S., at 184-185.

II. The rejection of the Sherman Amendment in 1871 is inapposite.

In Part II of its argument, Resp.Br. pp. 37-47, Respondent finally speaks to the Question Presented: does the cause of action arising directly under Section 1981 contain a "policy or custom" requirement?

We argued that the "policy or custom" requirement arises from certain "crucial terms" which are found in Section 1983. Since those crucial terms are missing from Section 1981, it cannot contain a "policy or custom" requirement. Pet.Br. pp. 21-26.

Respondent replies that the "policy or custom" requirement does not depend entirely on the language of the statute. He says that while *Monell, Tuttle, Pembaur,* and *Praprotnik,* were "braced...on the specific wording of Section 1983, the language of the act was not the only foundation upon which the Court built." Resp.Br. p. 38. Respondent contends there is another basis for the "policy or custom" requirement, namely Congress' rejection of the Sherman Amendment in 1871. *Id.,* at 38-39. Of course we are concerned with the intent of Congress in 1866, and this Court has often noted that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[48]

Respondent then compounds the error by glossing over a vital distinction. In footnote 57 of *Monell,* the Court taught that the 1871 Congress intended — by rejecting the Sherman Amendment — to reject *respondeat superior* liability for municipalities. However, it does not follow that by rejecting the Sherman Amendment, Congress also intended to adopt a "policy or custom" standard. A rejection of *respondeat superior* simply does not equate to an acceptance of a "policy or custom." The two concepts are not mutually exclusive. There are, in fact, several approaches to the problem of vicarious liability. *Cf., e.g., Meritor Savings Bank v. Vinson,* 477 U.S. 57, 106 S.Ct. 2399, 2410 (1986). *Respondeat superior* and "policy or custom" merely represent the two extremes.

Thus, while the rejection of the Sherman Amendment is evidence that the 1871 Congress did not want municipalities to

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48 See cases collected at *Mackey v. Lanier Collections Agency & Service, Inc.,* 108 S.Ct. 2182, 101 L.Ed. 634 (1988); and *Communications Workers of America v. Beck,* 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988) (Blackmun, J., concurring).

be held liable on a *respondeat superior* basis, it is not evidence that that Congress also believed that the proper standard was "policy or custom." The "policy or custom" requirement can only come from the "crucial terms" of Section 1983.

We have demonstrated that these crucial terms cannot apply to Section 1981, and Respondent has not challenged this. Thus, the "policy or custom" requirement cannot apply to Section 1981.

III. The assessment of the Monell Facts in this case should be dealt with on remand

Respondent's only discussion of the *Monell* issue is found in a series of scattered footnotes,[49] which raise a fact-bound issue: whether the General Superintendent of the Dallas Independent School District is a policymaking official within the meaning of *Monell*. The Superintendent is the chief executive officer of a large metropolitan school district. He directs 15,000 employees and oversees the education of more than 100,000 students. In the face of this Respondent insists, apparently seriously, that the Superintendent "is not a policymaker". Resp.Br. p. 7.

The fact specific issue of whether the Superintendent has authority to make policy is not — particularly at this juncture — an appropriate issue for resolution by this Court. First this simply is not the issue which Respondent originally asked this Court to review. Second, the Fifth Circuit expressly did not decide whether the Superintendent had policymaking authority. That issue should be resolved in the first instance by the lower courts "who deal regularly with questions of state law in their respective [courts] and [who] are in a better position than [this Court] to determine how local courts would dispose of comparable issues." *Butner v. United States*, 440 U.S. 48, 58 (1979).

CONCLUSION

The Court should affirm Petitioner's Section 1981 recovery against Respondent. The Section 1983 portion of the case should be remanded to the District Court.

Respectfully submitted,

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49 Brief for Respondent, p. 7 nn. 9-11, p. 8, nn. 12, 14, p. 36, n. 36.